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EFTA SURVEILLANCE  
AUTHORITY

**Ref: HT. 3639**

**European Commission  
Directorate-General for Competition  
State aid Registry  
1049 Brussels**

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Dear Sir, Dear Madam,

**Subject: Comments on the draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU**

On 17 January 2014, the European Commission (“the Commission”) launched a public consultation on the draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU (“draft Notice”<sup>1</sup>).

The Authority would like to share its practical experience and recall the case-law of the EFTA Court on State aid matters. It also invites the Commission to consider the following comments when preparing the final version

The comments below follow the structure and numbering of the draft Notice.

## **1. Preliminary comment**

The Authority suggests that the Commission could, in the introductory part of the Notice, underline that State aid is an objective concept, based on its **effects** and, therefore, disregarding its objectives (see *inter alia*: Case T-177/07 *Mediaset v Commission*, [2010] ECR II 02341, paragraph 61 C-403/10 P *Mediaset v Commission*, [2011] ECR I-00117, paragraph 20, and Case C-487/06 P *British Aggregates v Commission*, [2008] ECR I-10515, paragraph 92).

Although there is a reference to this matter in paragraphs 68 and 79, the Authority believes that it would be better placed at the outset with references to some examples and the relevant case-law.

## **2. Introduction**

In paragraph 2 of the draft Notice, it should be clarified that the Notice in itself does not create legitimate expectations for the aid recipients since it is interpretative in nature.

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<sup>1</sup> Link to draft Notice available on: [http://ec.europa.eu/competition/consultations/2014\\_state\\_aid\\_notion/-draft\\_guidance\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_state_aid_notion/-draft_guidance_en.pdf)

### 3. Notion of undertaking and economic activity

#### 3.1 General principles

The Authority believes that the reference to “different” criteria in paragraph 16 may be too absolute. The Authority suggests to review the wording and include a reference to the EFTA Court judgement in Case E-5/07 *Private Barnehagers Landsforbund*,<sup>2</sup> where it was stated, quoting *Humbel*<sup>3</sup> case-law, that “[t]he notion of “service” within the meaning of the fundamental freedoms, can be transposed to a State aid case”.<sup>4</sup>

Pursuant to well established case-law, any activity consisting of offering goods and services on a *market* is an economic activity.<sup>5</sup> Taking into account this premise, and having read paragraph 7 and seq. of the draft Notice, the Authority would welcome further clarifications about what characteristics would be required to conclude that a “market” exists.

Paragraph 14 provides that “[a]n economic activity can exist where other operators would be willing and able to provide the service in the market concerned”.

However, the Authority has already pointed out<sup>6</sup> and would like to underline again, that this appreciation might go beyond existing case-law.

On this issue, the Authority would like to refer to the EFTA Court judgment E-5/07, paragraph 80, where it is confirmed that “[w]hen the nature of an activity carried out by a public entity is assessed with regard to the State aid rules, it cannot matter whether the activity might, in principle, be pursued by a private operator.”<sup>7</sup> Such an interpretation would basically bring any activity of the State not consisting in an exercise of public authority under the notion of economic activity”.

The Authority would like to draw the Commission’s attention to this judgment, and would welcome a clarification on the concept of “market”.

Concerning the definition of “economic activity”, the Authority submits that it is important to point out that the economic activity normally presupposes remuneration (Joined Cases C-180/98 to C-184/98, *Pavel Pavlov and Others*, [2000] ECR I-6451, paragraph 76; C-475/99, *Ambulanz Glöckner*, [2001] ECR –09089, paragraph 20). Reference may also be made, for the sake of completeness, to Article 57 TFEU which stipulates that services are normally provided for remuneration.

The Authority also submits that paragraph 9 could be supplemented by adding that the charging of fees for a service, at the same token, does not imply existence of an economic

<sup>2</sup> Case E-5/07 *Private Barnehagers Landsforbund*, EFTA Court Rep. [2008], p 62.

<sup>3</sup> Case 263/86 *Humbel* [1988] ECR 5365.

<sup>4</sup> See para. 80.

<sup>5</sup> See case-law quoted in footnote no 5 of the draft Notice.

<sup>6</sup> See the EFTA Surveillance Authority’s comments on the draft Commission Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (hereafter “Communication on SGEI”), available on: [http://ec.europa.eu/competition/consultations/2011\\_sgei/efta\\_surveillance\\_authority\\_en.pdf](http://ec.europa.eu/competition/consultations/2011_sgei/efta_surveillance_authority_en.pdf)

<sup>7</sup> See footnote No 2.



activity, if these services come under the public remit (Case C 343/95, *Diego Calí*, [1997] ECR I-1547, paragraph 25).

The Authority would further invite the Commission to supplement paragraph 14 with the definition of the notion of “in-house” operator in view of the *Teckal* case-law and subsequent jurisprudence.

The last sentence of paragraph 14 reads as follows: “*More generally, the fact that a particular service is provided in-house(fn7) has no relevance for the economic nature of the activity(fn8)*”. The Authority invites the Commission to clarify and provide some examples of cases where in-house activities would not be of an economic nature.

For instance reference can be made to the Court of First Instance judgement in *Centro Studio Manieri* where it found that the Office of Infrastructure and Logistics (OIB) of the European Commission could not be held to constitute an undertaking as “*the OIB is an office which is responsible for managing the purely internal requirements of the Community and is not at all commercially orientated, so that it cannot be classified as a public undertaking within the meaning of Article 86 EC*”<sup>8</sup> (now Article 106 TFEU).

### 3.2 Infrastructure

The Authority welcomes the clarifications provided in the draft Notice regarding the legal effects of the judgment in Case T-128/98 *Aéroports de Paris* for the legal assessment of infrastructure investments. However, the Authority would suggest that the Commission includes further clarifications as regards the assessment of infrastructure projects at different levels (e.g. constructor, operator and user).

### 3.3 State resources

#### 3.3.1 General principles

The Authority suggests reviewing the wording of paragraph 50. Last sentence should be modified as follows “*[f]unds provided by the central bank of a Member State to specific credit institutions generally **imply the existence of state resources***”. In the same line, footnote 73 should be better placed in the section devoted to advantage or selectivity.

Paragraph 53 refers to different situations that imply a transfer of funds. The draft Notice clarifies that “*[a] positive transfer of funds is not necessary, as a foregoing State revenues is sufficient*”. To complete the list of examples provided by the Commission, the Authority suggests that a reference is made to its decision of 30 April 2013 (Decision No 117/13/COL) where it was also stated that a guarantee against a future increase of tax rates constitutes in itself State aid.<sup>9</sup>

<sup>8</sup> Case T-125/06 *Centro Studio Manieri v Council* [2009] ECR II-69, paragraph 78.

<sup>9</sup> EFTA Surveillance Authority Decision No 177/13/COL of 30 April 2013 to initiate the formal investigation procedure with regard to the Investment Incentives Scheme and certain Investment Agreements. Para. 35 of the decision establishes that “*[t]he Authority notes that the Scheme and the six Investment Agreements contain a clause protecting against future increase of the statutory rate of income tax. This guarantee against future legislative changes in itself constitutes state aid in the Authority’s view*”.

The Authority suggests to replace the sentence, in paragraph 56, “[p]rovided that all the operators concerned are treated equally” with the following “[p]rovided that all the operators concerned are treated in line with the **principle of non-discrimination**”, as also underlined in footnote 83.

## 4. Advantage

### 4.1 Notion of advantage in general

#### 4.1.1 General principles

Within this sub-title, the Authority suggests that the Commission refers to Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, [2006] ECR I-5479, paragraphs 112 and 120), where the Court of Justice has stated that the fact that undertakings benefiting from an exemption from normal tax enjoy such an economic advantage cannot be justified on the ground that other exemptions from that tax are available to other undertakings. Accordingly, the fact that there are other derogations from the normal tax regime in addition to that of the scheme in question does not undermine the finding that the scheme is, in fact, derogatory in nature.

Furthermore, paragraph 73 of the draft Notice states “[m]oreover, the existence of an advantage should be ruled out in the case of a reimbursement of illegally assessed taxes, an obligation condemnation on the national authorities to compensate for damage they have caused to certain undertakings or the payment of compensation for an expropriation”. The Authority would suggest to review this wording in order to clarify that this paragraph does not contain an exhaustive list of hypotheses and therefore the same conclusion would be reached whenever the concerned State carries out its legal responsibilities.

### 4.2 The market economy operator (MEO) test

Paragraphs 91 to 99 of the draft Notice concern the ways in which a market price can be established through a tender procedure.

Paragraph 91 refers to the sale and purchase of assets, goods and services. According to the draft Notice the existence of State aid will be refuted if the operation is carried out through a public procurement procedure. It appears from this paragraph that in order to avoid the existence of aid, a public procurement procedure should be launched (irrespective of whether the public procurement Directives are applicable). If a tender is not launched, the Notice states that the transaction might still be in line with market conditions on the basis of benchmarking or other assessment methodologies, but the kind of examples the Notice provides for mainly relate to investment cases.

The Authority welcomes the proposal from the Commission to repeal the Communication on State aids elements in sales of land and buildings by public authorities.<sup>10</sup> However, the Authority invites the Commission to provide further clarification as to the circumstances under which, provided that a public tender has not been launched, the absence of aid can still be demonstrated. On the basis of our case experience, the Authority has

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<sup>10</sup> Commission Communication on State aid elements in sales of land and buildings by public authorities (97/C 209/03).



acknowledged that other than through public tenders, the existence of aid can also be excluded, for certain categories of land (generally smaller properties and without special features),<sup>11</sup> through a benchmarking exercise based on historical data relating to similar transactions.

Paragraph 91 states that if the sale of assets, goods or services is carried out following a tender procedure pursuant to the Public Procurement Directives, “[i]t can be presumed that the transaction is in line with the market conditions”. The Public Procurement Directives accept to award the contract to the *most economically advantageous offer*. However, paragraph 97 states that “when public bodies sell assets, goods and services the only relevant criterion for selecting the buyer should be the highest price”. The Authority suggests therefore alignment of those paragraphs, since the concept of “the most economically advantageous offer” as stipulated in the public procurement sector, does not imply the award of the contract to the highest price.

Paragraph 96 establishes that “if there is a condition that the purchaser is to assume special obligations – other than those arising from general domestic law or decision of the planning authorities – for the benefit of the public authorities or in the general public interest, the tender cannot be considered unconditional”. The Authority suggests to clarify the notion of “general domestic law” and “decision of the planning authorities” providing some practical examples.

In the context of the above, the Authority suggests that footnote 147 is amended to read as follows: “Joined Cases T-268/08 and T-281/08 *Land Burgenland and Austria v Commission* [2012], paragraph 87. **The EFTA Court took a similar approach in a case relating to the lease of an asset in Case E-1/13 *Mila v EFTA Surveillance Authority*.**”

Regarding the sale of public land, the Authority also suggests that the Commission refers in footnotes 148 and/or 149 to two important EFTA Court cases (i.e. judgment in Case E-12/11 *Asker Brygge AS v. Authority*, relating to the assessment of option to purchase agreements, and judgment in Case E-9/12 *Iceland v. Authority*, relating to the means of publication).

## 5. Selectivity

### 5.1 Selectivity stemming from discretionary administrative practices

According to paragraph 124 of the draft Notice “*Measures which prima facie apply to all undertakings, but are (or may be) limited by the discretionary power of administration, are selective. This is the case where meeting the given criteria does not automatically result in an entitlement to the measure*”.

In the Authority’s opinion, this statement could be further clarified. What would be the conclusion in cases where the State verifies *ex ante* that those eligibility criteria are fulfilled, without granting nevertheless the State any margin of discretion? The Authority understands that in such a case, the measure would be a general one. However, clarifications on this point would be welcomed.

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<sup>11</sup> EFTA Surveillance Authority Decision No 90/12/COL of 15 March 2012 on the sale of certain buildings at the Inner Camp at Haslemoen Leir.

Likewise, and despite the extensive case-law on the subject, the selectivity test is frequently difficult to apply to tax measures. The borders between a general measure and State aid are in certain cases very vague. As a consequence, and taking into account that the draft Notice will replace the Commission Notice on the application of the State aid rules to measures relating to direct business taxation<sup>12</sup>, the Authority suggests to provide further practical examples and references to the settled case-law.

## **6. Effect on trade and Competition**

### **6.1 Distortion of competition**

According to paragraph 189, a possible distortion of competition is excluded where a recipient of an advantage stemming from public resources is (i) providing a service subject to an EEA-law compliant legal monopoly and (ii) the recipient is not active (due to regulatory or statutory constraints) in a liberalised market.

The Authority notes that the Commission has not referred to case-law or established decision making practice with regard to the second requirement. The Authority invites the Commission to consider whether a requirement of account separation (which in the currently applicable State aid framework is the tool applied to ensure that the financing of non-economic or SGEI activities do not cross-subsidise purely commercial activities) would ensure that no public funds would flow to the activities on the liberalised market.

Please do not hesitate to contact the responsible case handlers, Mihalis Kekelekis (02 286 18 40) or María Muñoz de Juan (02 286 18 23) in case of any queries regarding these comments.

Yours faithfully,



Guðlaugur Stefánsson

Deputy Director

Competition and State Aid Directorate

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<sup>12</sup> Commission Notice on the application of the State aid rules to measures relating to direct business taxation. OJ C 384, 10/12/1998 P. 3 – 9

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